BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D. C. 20001-8002

DATE: August 27, 1997

CASE NO: 96-INA-0120

In the Matter of:

REBEL FABRICS
Employer,

On Behalf of:

ROBERTO GHAN,
Alien

Appearance: Andrew K. Chow, Esq., New York, NY
for the Employer and Alien

Before: Holmes,Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Roberto Ghan ("Alien") filed by Employer Rebel Fabrics. ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is

to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 29, 1993, Employer filed an application for labor certification to enable the Alien to fill the position of "Financial Manager" at a yearly salary of $59,148.00. Four years of experience in the job offered was required; educational requirement was a College Bachelor degree in Business or Commerce. The job offered was described as:

> Prepare financial reports to conduct operations. Oversee flow of cash. Assess present and future financial status. Analyze financial records. Develop policies and procedures for account collections & extension of credit to customers. Advise management.

"Experience must include bank loans, letters of credit, accounting procedures & financing. Will travel to Asia." was listed under "Other Special Requirements." (AF 58).

A transmittal with accompanying worksheet from the state agency indicated that there were 17 applicants, all of whom were rejected.

On July 11, 1994, the CO issued a Notice of Findings in which he notified the Employer of the Department of Labor's intention to deny the application on several bases. The requirement of four years experience as a bank manager and experience making bank loans and letters of credit was found unduly restrictive. Corrective action required was documentation of the necessity of this requirement (or amending the application). Secondly, the CO questioned the rejection of U.S. workers. Under 656.21(b)(6) U.S. workers Penner, Yu, Gonzalez and Hintlian were rejected for other than valid, job-related reasons; under 656.24(b)(2)(ii) applicants Kirshner, Choung, Logan, Jennings, Loeper, Lurie and Brentnall appeared to show education, training and experience that would qualify them for the job opportunity; applicants Ferguson, Mateescu and Jacobellis were not contacted until at least one and perhaps two months

after resumes were referred to employer, thus a timely good-faith recruitment effort was not made. The CO required documentation to rebut these findings. (AF-53-56).

The Employer submitted its rebuttal on August 12, 1994 through the letter of its president(with attachments) which addressed the issues raised by the CO on a point by point basis. (AF 43-52). On September 26, 1994, a supplementary NOF was issued in order to afford the Employer "..an opportunity to address issues or correct deficiencies which arose as a result of (it's) rebuttal .." Specifically, the CO while appreciating explanation of business necessity of the special requirements, reiterated that the regulations require employer to "..show that the job requirements as described represent the employer's minimum requirement for the job." On November 18, 1994, Employer through counsel, submitted documentation in the form of letters from similar companies concerning business requirements, and reiterated its position with fuller explanations concerning rejection of U.S. applicants. (AF-10-37)

On March 17, 1995, the CO issued a Final Determination in which he found the Employer's rebuttal unacceptable on several grounds. "Your unsubstantiated opinion of what requirements are common (to the business) show to us your stated job requirements are actually preferences for your convenience and tailored to the alien's background, rather than having a business necessity." The CO found seven of the applicants were rejected based on the restrictive requirement, while three applicants, admittedly, were not timely contacted. He therefore denied the application. (AF 7-9).

The Employer requested review of that denial on April 21, 1995. (AF-1-6).

DISCUSSION

Section 656.21(b)(6)[1] provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-related reasons; section 656.20(c)(8) provides that the application must show the job opportunity has been and is open to any qualified U.S. worker; and section 656.21(j) requires the employer to provide the local office with a written report of the results of the employer's post-application recruitment efforts. Under section 656.24(b)(1), the CO's determination whether to grant labor certification is made on the basis of whether the employer has met the requirements of Part 656, but labor certification may be granted despite harmless error, provided that the job market has been tested sufficiently to warrant a finding of unavailability. Under section 656.24(b)(2)(ii), the CO's determination is made based upon whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity; such worker will be considered able and qualified if "by education, training, experience, or a combination thereof, [the

[1] All section references are to title 20 of the Code of Federal Regulations.

worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

In general, an applicant is considered qualified for the job if he or she meets the minimum requirements specified by an employer's application for labor certification. ***The Worcester Co, Inc.,*** 93-INA-270 (Dec. 2, 1994); ***First Michigan Bank Corp.,*** 92-INA-256 (July 28, 1994). However, an employer may reject an applicant who meets the stated requirements but is nevertheless demonstrably incompetent to perform the main duties of the job, based upon information obtained from references or objective testing during the interview. ***First Michigan Bank Corp., supra.*** Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all the job requirements, an employer should further investigate the applicant's credentials by an interview or otherwise. ***See Dearborn Public Schools,*** 91-INA-222 (Dec. 7, 1993) (***en banc***); ***Gorchev & Gorchev Graphic Design,*** 89-INA-118 (Nov. 29, 1990) (***en banc***).

In the instant case, the CO found that the Employer had not stated an adequate basis for rejecting seven applicants. In this regard, even assuming, arguendo that Employer's special requirements were not unduly restrictive, Employer had a duty to interview applicants that seemed to reasonably be qualified for the job opportunity. We find several of the applicants meet such a description, for example, Alan H. Kirschner, while not fitting the exact qualifications set out by Employer, should have been interviewed to determine if his education and experience was comparable to that desired. Similarly, telephonic interviews of applicants Gonzalez and Loeper, *inter alia*, would not suffice to determine whether or not they were willing, qualified applicants. As found correctly by the CO, failure to contact three of the seemingly qualified applicants until over one month later is grounds for denial of certification in itself, since it shows a lack of good-faith recruitment effort. Foster Electrical Service, Inc. (June 30, 1989)

In view of the above, the application should be denied for failure to establish a good faith effort to recruit.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

_____

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.